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No.

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

SHIRLEY MIDDLETON,

Petitioner

vs.

CESAR PERALES as Commissioner of the New York State Department of Social Services, and WILLIAM GRINKER (as successor to HARVEY ROBBINS), as Commissioner of the New York City Department of Social Services,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION SUPREME COURT OF NEW YORK SECOND JUDICIAL DEPARTMENT

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QUESTIONS PRESENTED

1. **Whether the Court below violated the Supremacy Clause of the United States Constitution by repudiating the federal standards for awarding attorneys fees under 42 U.S.C. §1988.**

2. **Whether the Petitioner alleged a substantial federal claim warranting an award of attorneys' fees under 42 U.S.C. §1988.**

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CESAR PERALES, as Commissioner of the New York State Department of Social Services, and WILLIAM GRINKER (as successor to HARVEY ROBBINS), as Commissioner of the New York City Department of Social Services

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION SUPREME COURT OF NEW YORK SECOND JUDICIAL DEPARTMENT

The petitioner, Shirley Middleton, by and through her counsel, petitions for a Writ of Certiori to review the judgment of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department in this case.

OPINIONS BELOW

The order of the Court of Appeals of New York, denying petitioner's motion for leave to appeal from an order of the

Supreme Court of the State of New York, Appellate Division, Second Department is not reported (App.,*infra*, 1a). The opinion of the Appellate Division, Second Department is reported at 160 A.D.2d 800, 554 N.Y.S.2d 71 (App., *infra* 2a-5a). The opinion of the Supreme Court, Kings County, is not reported (App., *infra*, 4a-8a).

JURISDICTION

The judgment of the Appellate Division of the Supreme Court of the State of New York, Second Department, was entered on April 9, 1990 (App., *infra*, 2a). A motion to the Second Department for leave to appeal to the Court of Appeals was denied on July 3, 1990 (App., *infra*, 9a). A motion to the Court of Appeals for leave to appeal was denied on December 20, 1990 (App., *infra*, 1a). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(a).

APPLICABLE LAW

FEDERAL LAW

Article VI, Clause 2 of the United States Constitution provides:

> This Constitution and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding.

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law...

The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988, provides in relevant part:

> ...In any action or proceeding to enforce a provision of Sections 1981, 1982, 1983, 1985 and 1986 of this Title, ...the court in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

7 U.S.C. Section 2020(e) of the Food Stamp Act provides in relevant part:

The State plan of operation required under subsection (d) of this section shall provide, among such other provisions as may be required by regulation:

> (10) for the granting of a fair hearing and a prompt determination thereafter to any household aggrieved by the action of the State agency under any provision of its plan of operation as it affects the participation of such household in the food stamp program...

7 C.F.R. Section 273.15 of the regulations of the Food and Nutrition Service of the United State Department of Agriculture provides in relevant part:

> (a) *Availability of hearings.* Except as provided in Section 271.7(f), each State agency shall provide a fair hearing to any household aggrieved by any action of the State agency which affects the participation of the household in the Program.
>
> (c) *Timely action on hearings-(1) State level hearings.* Within 60 days of the receipt of a request for a fair hearing, the State agency shall assure that the hearing is conducted, a decision is reached, and the household and local agency are notified of the decision. Decisions which result in an increase in household benefits shall be reflected in the coupon allotment within 10 days of the receipt of the hearing decision even if the State agency must

provide a supplementary ATP or otherwise provide the household with an opportunity to obtain the allotment outside of the normal issuance cycle. However, the State agency may take longer than 10 days if it elects to make the decision effective in the household's normal issuance cycle, provided that the issuance will occur within 60 days from the household's request for the hearing...

(s) *Implementation of final State agency decisions.* The State agency is responsible for insuring that all final hearing decisions are reflected in the household's coupon allotment within the time limits specified in paragraph (c) of this section.

STATE LAW

Section 22(9)(a) of the New York State Social Services Law provides:

> All decisions of the Commissioner pursuant to this section shall be binding upon the social services districts involved and shall be complied with by the social services officials thereof.

Section 34(3)(e) of the New York State Social Services Law provides:

> The commissioner shall enforce this chapter and the regulations of the department within the State and in the local government units.

18 N.Y.C.R.R. Section 358-6.4 [formerly 358.18(a)(1)] provides in relevant part:

> (b)(1) For all cases involving food stamp issues only the decision must be issued and the parties notified of the decision within 60 days of receipt of the request for the fair hearing by the department.
>
> (2) If the decision will result in an increase in household food stamp benefits, social services agencies must reflect such increase in the coupon allotment within 10 days of the receipt of the hearing decision: however, the increase may occur later than 10 days after the decision if the social services agency decides to make the decision effective in the household's normal issuance cycle and the issuance will occur within 60 days from the household's request for a hearing...

STATEMENT OF THE CASE

Petitioner commenced this proceeding in the Supreme Court of the State of New York, County of Kings, on or about November 18, 1986, to compel the New York City Department of Social Services (city agency) to restore her food stamp benefits pursuant to respondent Perales' decision after a fair hearing, dated August 18, 1986 (App., *infra*, 10a-12a).

The city agency discontinued petitioner's food stamp allotment in January, 1986, without written notice to her, for

allegedly failing to verify her household income. Prior to the discontinuance, petitioner had been receiving food stamps for herself, two daughters, ages 20 and 14, her 6 year-old grandchild, and three foster children, ages 12, 11 and 5.

Petitioner challenged the termination of her food stamps at a fair hearing before the New York State Department of Social Services (state agency). On August 18, 1986, respondent Perales rendered a decision holding that the discontinuance was incorrect and directing the city agency to restore petitioner's food stamps retroactive to the date they were terminated (App., *infra*, 10a-12a).

Petitioner attempted to obtain compliance with the decision but the city agency was determined to disobey the State agency's directive. On August 26, 1986, petitioner's attorney sent a letter to the city agency's Linden Income Maintenance Center requesting that her food stamps be restored pursuant to the decision. About ten days later, an employee of the Center told petitioner that the decision would not be implemented because the discontinuance of her food stamps was correct. This led petitioner's attorney to write another letter to the Center and to make a written complaint to the state agency's fair hearing compliance unit.

Despite petitioner's efforts to gain compliance with respondent Perales' directive, the Linden Center refused to restore petitioner's food stamps. It even went so far as to send the city agency's Fair Hearing Monitoring Section a memorandum stating that it would not comply with the hearing decision because it believed petitioner was not entitled to any food stamps. This memorandum was received by the state agency but it took no action to demand compliance.

Due to the lawlessness of the city agency and the inaction of the state agency, petitioner was compelled to bring this proceeding

to obtain compliance with the hearing decision. The respondents did not oppose the petition, and on January 6, 1987, the city agency issued petitioner more than $900 in retroactive food stamps. Consequently, petitioner withdrew the proceeding.

The Linden Center, however, continued to engage in further unlawful action, discontinuing petitioner's food stamps the very next month. This time it sent her a notice, dated December 24, 1986, stating that it intended to terminate her food stamps for failing to verify the household's foster care and Supplemental Security Income. The notice stated that this action was being taken in compliance with the August, 1986 hearing decision. This statement reflected a total distortion of that decision, which emphasized that petitioner was never requested to verify her household income (App., *infra*, 11a).

As a result of the discontinuance, petitioner was forced to attend another hearing on the same issue previously decided in her favor. On April 15, 1987, respondent Perales rendered a decision reversing the city agency and ordering it to restore her benefit (App., *infra,* 13a-16a)

Although the city agency provided petitioner with food stamps for February, 1987 through May, 1987, it discontinued them, without notice, for a third time in May, 1987, prompting petitioner to restore this proceeding to the calendar. In July, 1987, the city agency agreed to enter into a Consent Order to comply with both hearing decisions, and on August 6, 1987, the lower court signed the order (App., *infra,* 17a-18a)

On November 25, 1987, petitioner moved for attorney's fees pursuant to 42 U.S.C Section 1988, alleging that she was a prevailing party in a proceeding pursuant to 42 U.S.C. Section 1983. In a decision issued on April 14, 1988, the lower court held

that petitioner was entitled to an award of attorney's fees and that respondent Perales was solely responsible for payment (App., *infra*, 4a-8a).

An order and judgment was entered on June 28, 1988 requiring respondent Perales to pay $3,662.50 in attorney's fees (App., *infra*, 19a-20a). Respondent Perales took an appeal from this order.

On April 9, 1990, the Appellate Division of the New York State Supreme Court for the Second Judicial Department, rendered a unanimous decision reversing the lower court's order (App., *infra*, 2a-3a). The Second Department maintained that attorney's fees were not warranted because a proceeding to compel compliance with a fair hearing decision deals with the administrative application of state statutes and regulations, and petitioner failed to show a violation of any rights created by federal law.

On May 25, 1990, petitioner made a motion to the Second Department requesting permission to appeal to the Court of Appeals. The motion was denied on July 3, 1990 (App., *infra*, 9a). Petitioner then asked the Court of Appeals for leave to appeal but this request was denied in a decision issued on December 20, 1990 (App., *infra*, 1a).

I. ARGUMENT

The New York State Court of Appeals and New York State Supreme Court, Appellate Division, Second Department are failing and refusing to apply Federal Decisional Law and Principles

interpreting 42 U.S.C. §§1983 and 1988 in violation of the Supremacy Clause of the United States Constitution.

In *Maine v. Thibitout*, 448 U.S. 1,11, 100 S.Ct. 2502, 2508, 65 L.E.2d 555 (1980), this Court stated that Congress considered the attorney's fees authorized by 42 U.S.C. Section 1988 to be an "integral part of the remedies necessary to obtain" compliance with 42 U.S.C Section 1983. See S.R. No. 94-1011, p.5 (1976); U.S Code Cong. and Admin. News 1976 at 5913. Consistent with this purpose, and by virtue of the Supremacy Clause, the Court held that attorney's fees are part of the Section 1983 remedy in state, as well as federal court. It was noted that if fees were not available in state courts, federalism concerns would be raised because plaintiffs would be compelled to bring complaints regarding state actions in federal court. 448 U.S. at 11, n.12, 100 S.Ct. at 2508, n.12.

The decision which this Court is being asked to review reflects an ominous pattern in which the Appellate Division, Second Department of the Supreme Court of the State of New York is severely limiting the ability of recipients of government benefits to obtain attorney's fees under 42 U.S.C. Section 1988.[1] In violation of its obligation under the Supremacy Clause, the Appellate Division often has refused to take cognizance of substantial federal claims asserted by petitioners who prevail in proceedings brought under Section 1983, and/has misstated the test regarding entitlement

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[1] *Thomasel v. Perales*, 161 A.D.2d 646, 555 N.Y.S.2d 423 (2d Dept. 1990); *Cruz v. Perales*, 158 A.D.2d 597, 551 N.Y.S.2d 569 (2d Dept. 1990); *Rashid v. Perales*, 156 A.D.2d 692, 549 N.Y.S.2d 166 (2d Dept. 1989); *Rozier v. Perales*, 149 A.D.2d 710, 540 N.Y.S.2d 504 (2d Dept. 1989) appeal denied. 74 N.Y.2d 993, 550 N.Y.S.2d 274, 549 N.Y.S.2d 476 (1989).

to attorney's fees. In this case, the Appellate Division, stated the case as follows:

> There was no showing by the petitioner of a violation of any constitutional right, or the violation by the state of any right created by Federal Law.... There was therefore no bonafide civil rights claim pursuant to 42 U.S.C. §1983 which would warrant an award of attorney's fees. *Middleton v. Perales*, 160 A.D.2d 800, 801, 554 N.Y.S.2d 71, 72 (2d Dept 1990). [emphasis added]

The above test clearly violates the standards established by this Court for determining whether a cognizable Section 1983 claim has been asserted which would entitle a person to attorney's fees. *See, Maher v. Gagne* 448 U.S. 122, 133, n. 15, 100 S.Ct. 2570, 2576, n. 15, 65 L.E.1 2d 653 (1980); *Hagans v. Lavine*, 415 U.S. 528, 94 S.Ct.1342, 39 L.Ed.2d 577 (1974). By requiring an actual showing of a violation of federal law in cases where the petitioner obtained relief through a settlement or consent order, the Appellate Division has distorted the "substantiality" test set forth in Hagens v. Lavinia, supra (See *infra*. 21).

It is beyond dispute that when an action is brought in state court to enforce rights under federal law, the Supremacy Clause requires that federal law and policy be enforced. *Howlett v. Rose*, 496 U.S.__, 110 S.Ct. 2430, 2438, 110 L.E.2d 332 (1990); *Felder v. Casey*, 487 U.S. 131, 143, 108 S.Ct. 2302, 2309 101 L.E.2d 123 (1988); *Martinez v. California*, 444 U.S. 277, 284, 100 S.Ct. 553, 558, 62 L.E.2d 481 (1980). The Supremacy Clause makes federal laws the Supreme Law of the Land and "...charges state courts with a coordinate responsibility to enforce..." them. *Howlett v. Rose*, 496 U.S. at __, 110 S.Ct. at 2438. When a state court action seeks to enforce federal law, the state court is "...bound to

proceed in such manner that all the substantial rights of the parties under controlling federal law [are] protected." *Felder v. Casey*, 487 U.S. at 151, 108 S.Ct. at 2313, quoting from *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 245, 63 S.Ct. 246, 251, 87 L.E.2d 239 (1942).

In cases such as the this one, plaintiffs who request attorney's fees under Section 1988 frequently seek relief on both federal and state grounds. It is well-established that if the plaintiff prevailed on state law grounds, and the federal claim was not addressed in either the judgment or settlement, the court must assess the federal claim to determine if attorney's fees are warranted. In *Maher v. Gagne*, 448 U.S. at 133, n. 15, 100 S.Ct. at 2576, n.15, 65 L.E.1 2d 653 (1980), quoting H.R. Rep. No. 94-1558, p.4, n.7 (1976), this Court observed:

> To the extent a plaintiff joins a claim under one of the statutes enumerated in H.R. 15460 with a claim that does not allow attorney's fees, that plaintiff, if it prevails on the non-fee claim is entitled to a determination on the other claim for purposes of awarding counsel fees... In such cases, if the claim for which fees may be awarded meets the substantiality test, see *Hagens v. Lavine*, 415 U.S. 528, 94 S.Ct. 1342, 39 L.E.2d 577 (1974); *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.E. 2d 218 (1966), attorneys' fees may be allowed even though the court declines to enter judgment for the plaintiff on that claim, so long as the plaintiff prevails on the non-fee claim arising out of a common nucleus of operative fact.

In the instant case, as well as in many others, the Appellate Division, Second Department in New York has failed to apply the

above standard in determining whether attorney's fees should be awarded. The petitioner herein alleged that the failure of the city agency to restore her food stamps pursuant to a fair hearing decision violated her rights under both state and federal laws. In particular, she alleged that the city agency violated both state and federal regulations regarding compliance with hearing decisions involving food stamps 7 C.F.R. Sec 273.15 (c)(1) and (s); 18 N.Y.C.R.R. Sec. 358.18(a)(1) and 358.22. She also contended that the refusal to comply with the decision violated her due process rights under the United States Constitution. The Appellate Division, however, failed to make any reference to the federal claims and held that petitioner was not entitled to attorney's fees because the proceeding merely involved the application of state statutes and regulations. *Middleton v. Perales*, 160 A.D.2d at, 801, 554 N.Y.S.2d at, 72 (2d Dept. 1990).

In Rashid v. Perales, 156 A.D.2d 692, 549 N.Y.S. 2d 166 (2d Dept. 1989) and *Rozier v. Perales*, 149 A.D.2d 710, 540 N.Y.S.2d 504 (2d Dept. 1989), appeal denied 74 N.Y.2d 933, 550 N.Y.S.2d 274, 549 N.E.2d 476 (1989) , the petitioners also alleged that the local agency's failure to comply with a fair hearing decision, violated their rights under federal regulations and the due process clause of the United States Constitution. In *Rozier*, 156 A.D.2d at 692, 540 N.Y.S.2d at 541, the court failed even to acknowledge the federal claims, holding that the underlying proceeding involved only state law. The court, in denying fees in *Rashid*, 549 N.Y.S.2d at 167, addressed only one of the federal claims alleged. It completely ignored the federal regulation governing compliance with hearing decisions concerning food stamps, and the due process claim.

In *Thomasel v. Perales*, 161 A.D.2d 646, 555 N.Y.S.2d 423 (2d Dept. 1990), the petitioner alleged that her due process rights were violated by the city agency's failure to provide her with

her public assistance benefits pending the outcome of her fair hearing. Once again, the court denied fees on the ground that the proceeding concerned the application of state law only, disregarding the federal due process claim alleged (161 A.D.2d 646, 555 N.Y.S.2d at 424).

Finally, in *Cruz v. Perales*, 158 A.D.2d 597, 551 N.Y.S.2D 569 (2d Dept. 1990), the petitioner alleged that the state agency violated her federal rights by issuing a decision affirming the city agency's discontinuance of her public assistance benefits due to her alleged possession of resources in excess of the allowable limitations. In particular, she alleged that the respondents considered a bank account available to her in violation of the regulations of the United States Department of Health and Human Services (45 C.F.R. Sec. 233(20)(a)(3)(11)(D). She also contended that the state agency violated her due process rights by not sufficiently developing her testimony during the hearing at which she was not represented by counsel.

In holding that petitioner was not entitled to attorney's fees, the court maintained that she neither alleged nor presented evidence of a claim pursuant to Section 1983. As in the instant case, the court completely ignored the federal claims asserted. (158 A.D.2d at 597, 551 N.Y.S.2d at 569)

It should be noted that the courts in other states properly apply the federal standard set forth in *Maher v. Gagne*, 448 U.S. 122, 100 S.Ct. 2570, 65 L.E.2d 653 (1980), and determine whether a plaintiff who prevails on state law grounds asserted a substantial federal claim arising from a common nucleus of facts. See e.g.: *Loft v. State Board of Higher Education*, 89 Or. App. 614, 750 P.2d 515, 517 (Or., 1988); *International Association of Machinists and Aerospace Workers v. Affleck*, 504 A.2d 468, 470-71 (R.I. 1986); *Allen v. District of Columbia*, 503 A.2d 1233, 1237 (D.C.

1986); *Brown v. City of Newark*, 202 N.J. Super. Ct., 493 A.2d 1255, 1260 (N.J. Super. Ct. App. Div. 1985), aff. in part, rev. in part, 113 N.J. 565, 552 A.2d 125 (N.J. 1989); *County Executive of Prince George's County v. Doe*, 300 Md. 445, 479 A.2d 352, 358 (Md. 1984); Davis v. Everrett, 443 So.2d 1232, 1235-36 (Ala. 1983). Ironically, the New York courts previously followed the correct federal standards, and their failure to do so in the recent past is inexplicable. *Johnson v. Blum*, 58 N.Y. 2d 454, 458, N.2, 461 N.Y.S.2d 782, 783, n.2, 448 N.E.2d 449 (1983).

By failing even to acknowledge the existence of all or some of the federal claims asserted in the above cases, the Appellate Division, Second Department has displayed a strong antagonism against Section 1983 actions and applications for attorney's fees pursuant to Section 1988. The United States Supreme Court has repeatedly held that such discrimination against a federal cause of action and a remedy to enforce it is clearly unacceptable under the Supremacy Clause. *Howlett v. Rose*, 496 U.S. at__, 110 S.Ct. at 2437 and 2445; *Testa v. Katt*, 330 U.S. 386, 393-94, 67 S.Ct. 810, 814-15, 91 L.E. 967 (1947); *McKnett v. St. Louis and San Francisco Railroad Co.*, 292 U.S. 230, 234 54 S.Ct. 690, 692, 78 L.E. 1227 (1934); *Mondou v. New York, N.H. & H.R. Co.*, 223 U.S. 1, 32 S.Ct. 169, 56 L.E. 327 (1912).

In *Howlett*, 496 U.S. at __, 110 S.Ct. at 2434, the Florida District Court of Appeal held that a municipal school board was immune from liability in state court under Section 1983 because Florida's statutory waiver of sovereign immunity did not extend to Section 1983 cases. 496 U.S. at _ 110 S.Ct. at 2434. This Court reversed, holding that the Florida court's refusal to entertain Section 1983 claims violated the Supremacy clause. 496 U.S. at _ _, 110 S.Ct. at 2442.

In reaching its conclusion, this Court emphasized that Florida constituted its lower courts as courts of general jurisdiction, exercising authority over tort claims against state and municipal entities. It also noted that these courts entertain Section 1983 claims against individual officers.496 U.S. at __, 110 S.Ct. at 2444.

This Court also considered the controlling federal law with respect to Section 1983 liability for government entities since the elements of a federal cause of action are defined by federal law. 496 U.S. at __, 110 S.Ct. at 2442, citing *Magnesian Southwestern Railroad Co. v. Morgan*, 486 U.S. 330, 335, 108 S.Ct. 1837, 1842, 100 L.E.2d 349 (1988). In doing so, it noted that although the word "person" in Section 1983 does not include the State by virtue of *Will v. Michigan Department of State Police*, 491 U.S. _ _, 109 S.Ct. 2304, 105 L.E.2d 45 (1989), municipal entities are considered persons subject to Section 1983 liability. *Monell v. N.Y.C. Dept. of Social Services*, 436 U.S. 658, 663, 98 S.Ct. 2018, 2021-22, 56 L.E.2d 611 (1978) Under the Supremacy clause, a state court must adhere to this interpretation. *Howlett v. Rose*, _ U.S.__, 110 S.Ct. at 2443.

Regarding Florida's immunity policy, this Court reasoned that a state policy that allows actions against state agencies for the negligence of its employees in a wide array of areas, but declines jurisdiction over federal actions for constitutional violations by the same persons, must reflect a rationale that such persons should not be liable under Section 1983 in state court. This Court concluded that such a rationale violated the Supremacy clause in that it reflected a disagreement with federal law or a "...refusal to take cognizance of the federal cause of action..." *Id* at 2445.

The *Howlett* decision reaffirmed Supremacy Clause principles long established by this Court. In *McKnett v. St. Louis*

and San Francisco Railroad Co., supra, the state court refused to exercise jurisdiction over a claim under the Federal Employer's Liability Act (FELA) against an out-of-state corporation for an injury sustained in another state. This Court held that since the state court had general jurisdiction over this type of action and similarly situated litigants, the refusal to hear the FELA action violated the Supremacy Clause by discriminating against rights arising under federal law. 292 U.S. at 234, 54 S.Ct. at 692.

In *Testa v. Katt, supra*, the plaintiff sued in state court to recover treble damages for an overcharge in the sale of a car in violation of the federal Emergency Price Control Act (EPCA). The Rhode Island Supreme Court declined jurisdiction, asserting that EPCA was a penal statute that would not be enforceable under the Full Faith and Credit Clause of the United States Constitution if passed by another state.

In reversing, this Court observed that courts in Rhode Island entertain the same type of claim under state law and claims for double damages under the federal law. It was, therefore, held that a state court may not decline jurisdiction over a federal claim "...because of conceptions of impolicy or want of wisdom on the part of Congress..." 330 U.S. at 394, 67 S.Ct. at 814-15, quoting from *Minneapolis and St. Louis Railroad Co. v. Bombolis*, 241 U.S. 211, 222, 36 S.Ct. 595, 598, 69 L.E. 247 (1924).

In view of the above authority, the Appellate Division in New York clearly is violating the Supremacy Clause by not applying the federal standard of *Maher v. Gagne, supra*, for determining whether a prevailing party is entitled to attorney's fees when state and federal claims are alleged. By refusing to take cognizance of some or all of the federal claims asserted in the series of cases discussed above, and by insisting that only state law is involved, the Appellate Division is discriminating against the

federal rights of recipients of government benefits. The effect of such discrimination is the repeated and, systematic denial of attorney's fees, frustrating the congressional goal of "...ensuring effective access to the judicial process for persons with civil rights grievances." *Hensley v. Eckerhart*, 461 U.S. 424, 430, 103 S.Ct. 1933, 1937, 76 L.E.2d 40 (1983), quoting from H.R. Rep. No. 94-1558, p. 1 (1976). Additionally, the decisions of the Appellate Division will,if they have not already done so, encourage recipients to bring their Section 1983 actions in federal court, an undesirable consequence this Court sought to avoid in *Maine v. Thiboutot*, 448 U.S. at 11, n. 12, 100 S.Ct. at 2508, n. 12.

II. Petitioner alleged a substantial federal claim warranting an award of attorney's fees under 42 U.S.C. Section 1988.

This Court has held that 42 U.S.C. Section 1983 provides a unique federal remedy and "...is to be accorded a sweep as broad as its language." *Felder v. Casey*, 487 U.S. at 139, 108 S.Ct. 2302, 2307. 101 L.E.2d 123 (1988); quoting from *United States v. Price*, 388 U.S. 787, 801, 86 S.Ct. 1152, 1160, 16 L.E.2d 267 (1966). Consistent with this approach, the Court in *Maine v. Thiboutot*, 448 U.S. at 4. 100 S.Ct. at 2504, held that Section 1983 includes claims based on statutory violations as well as the United States Constitution. Additionally, the federal courts of appeals have ruled that this section encompasses alleged violations of federal regulations. *Samuels v. District of Columbia*, 770 F.2d 184, 199 (D.C. Cir. 1985); *Alexander v. Polk*, 750 F.2d 250, 259 (3rd Cir., 1984).

In determining whether an alleged violation of a federal right is embraced by Section 1983, a two-step inquiry is to be undertaken. *Golden Gate Transit Corporation v. City of Los Angeles*, 493 U.S. _, 110 S.Ct. 444, 448, 107 L.E.2d 420 (1989). First, plaintiff must assert the violation of a federal right. This requires a showing that the regulation in question creates obligations on the government unit rather than merely expresses a preference for a certain type of action. The regulation must also have been intended for the benefit of persons such as the plaintiff. 493 U.S. at____, 110 S.Ct. at 448.

There can be no doubt that the federal regulations cited by petitioner confer rights upon recipients of food stamps who receive favorable fair hearing decisions. 7 C.F.R. Section 273.15(c)(1) provides in relevant part:

> Decisions which result in an increase in household benefits shall be reflected in the coupon allotment within 10 days of the receipt of the hearing decision... The state agency may take longer than 10 days if it elects to make the decision effective in the household's normal issuance cycle, provided that the issuance will occur within 60 days from the household's request for the hearing.

The above regulation clearly imposes an obligation on state agencies to ensure compliance with favorable fair hearing decisions within specified time periods. This is evidenced by the language stating that decisions resulting in an increase in benefits "...shall be reflected in the coupon allotment..." within a certain time [emphasis added]. An obligation also can be found in 7 C.F.R. Section

273.15(s), which provides that "...the state agency is responsible for ensuring that all final hearing decisions are reflected in the household's coupon allotment..." within the designated time limits of 7 C.F.R. Section 273.15(c)(1). Moreover, these regulations were obviously intended to benefit petitioner as she was a food stamp recipient who received a favorable fair hearing decision.

Once the plaintiff has met the requirements for asserting a violation of a federal right, the defendant has the burden of showing that Congress specifically foreclosed a remedy under Section 1983. *Golden Gate Transit Corporation v. City of Los Angeles* _U.S. at _, 110 S.Ct. at 448. The respondents in this case cannot make such a showing since the federal courts of appeals have held that recipients have a right of action under Section 1983 to enforce state compliance with the Food Stamp Act. *Victorian v. Miller*, 813 F.2d 718, 721 (5th Cir. 1987); *Haskins v. Stanton*, 794 F.2d 1273, 1275 (7th Cir. 1986). *See also*: H.R. Rep. No. 464, 95th Cong. 1st Session 398, reprinted in 1977, U.S. Code Cong. and Admin. News 1978, 2327. In reaching its decision in *Victorian, supra*, the Court noted that the Food Stamp Act does not provide separate judicial remedies and that the existence of a state administrative remedy does not foreclose resort to Section 1983. 813 F.2d at 723; *See also, Patsy v. Board of Regents of Florida*, 457 U.S. 496, 516, 102 S.Ct. 2557, 2567 (1982).

Having satisfied the above two-pronged test, petitioner must show that her federal claims meet the substantiality requirement set forth in *Hagens v. Lavine*, 415 U.S. 528, 94 S.Ct. 1342, 39 L.E.2d 577 (1974), in order to be entitled to attorney's fees under 42 U.S.C. Section 1988. (See *Maher v. Gagne*, 448 U.S. at 133, n.15; 100 S.Ct. at 2576, n.15.) In *Hagens, supra*, this Court held that a claim is of sufficient substance to support federal jurisdiction if it is not "absolutely devoid of merit", "obviously frivolous", "wholly insubstantial" or "no longer open to discussion." 415 U.S. at 536-

537, 94 S.Ct. at 1379. "Previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial..." 415 U.S. at 538, 94 S.Ct. at 1379.

Petitioner's claim that the city agency violated her rights under federal law by not complying with respondent Perales' hearing decision within the time limits required by the federal food stamp regulations clearly satisfies the substantiality test. For several months, the city agency wilfully refused to comply with the decision, depriving petitioner of benefits she needed to feed her large family. Additionally, the state agency, which was on notice of such non-compliance, did absolutely nothing to ensure that its directives were implemented within the specified time period, as the federal regulations explicitly require it to do. 7 C.F.R. Sec. 273.15(c)(1) and (s). When the city agency finally restored petitioner's food stamps in January, 1987, it was more than four and one-half months after the decision was issued and ten months after the hearing was requested. Accordingly, there was a very substantial violation of petitioner's federal rights, warranting an award of attorney's fees.

Petitioner also contended that she was entitled to attorney's fees because the respondents' inexcusable delay in complying with her hearing decision violated her due process rights under the United States Constitution. In *Atkins v. Parker*, 472 U.S. 115, 128, 105 S.Ct. 2520, 2528, 86 L.E.2d 81 (1985), this Court held that food stamps, like public assistance benefits, are entitlements for qualified persons and, therefore, are protected by the due process clause. Accordingly, since the city agency in this case was directed to restore petitioner's food stamps, it had to do so in a manner that comported with due process requirements.

In *Fusari v. Steinberg*, 419 U.S. 379, 95 S.Ct. 533, 42 L.E.2d 521 (1975), this Court suggested that significant delays in

issuing federal benefits may constitute a denial of due process. In assessing the procedures for reviewing initial denials of unemployment insurance benefits, the Court emphasized that the rapidity of administrative review and the length of wrongful deprivation is an important factor in determining the due process that is required. 419 U.S. at 389, 95 S.Ct. at 540.

In cases very analogous to the instant one, the courts have maintained that excessive delays in complying with hearing decisions may result in a denial of due process. In *Nelson v. Sugarman*, 361 F.Supp 1132, 1136 (S.D.N.Y. 1972), the court held that the alleged failure of the city agency to comply with hearing decisions in a timely manner stated a "...colorable issue of denial of due process safeguards...and, therefore, state a cause of action under 42 U.S.C. Section 1983." The Third Circuit, presented with a similar claim in *Shands v. Tull*, 602 F.2d 1156, 1159 (3rd Cir. 1979), observed that a delay in complying with hearing decisions "...could at some point constitute a denial of due process."

In view of the above cases, petitioner's due process claim is cognizable under 42 U.S.C. §1983, providing another basis for an award of attorney's fees. As the facts set forth above demonstrate, there was not merely a negligent delay in compliance with petitioner's hearing decision, but rather a determined effort by the city agency not to comply with it at all. This was clearly manifested in the Linden Income Maintenance Center's memorandum to the city agency's fair hearing compliance unit stating that it would not comply with the decision. Such intransigent conduct could certainly have led to a finding that petitioner's due process rights were violated as it rendered the fair hearing process meaningless, and caused petitioner to be without food stamps for four and one-half months after the decision was rendered.

As previously mentioned, the Appellate Division, Second Department in New York has distorted the substantiality test. In the instant case and in one of the cases discussed in Point I, *supra*, the Appellate Division denied fees on the ground that "...there was no showing by petitioner of a violation of any constitutional right, or the violation by the State of any right created by federal law." *Middleton v. Perales*,_160 AD2d at 801, 554 N.Y.S.2d at 72; *Thomasel v. Perales*, 161 A.D.2d 646, 555 N.Y.S.2d at 425. [emphais added] Additionally, the Court of Appeals in New York in *Zellweger v. New York State Department of Social Services*, 74 N.Y.2d 404, 409, 547 N.Y.S.2d 824, 826-27, 547 N.E.2d 79 (1989), held that the petitioner was not eligible for attorney's fees because "...the record does not indicate a violation of 42 U.S.C. Section 1988..."

It is not necessary for a plaintiff to make an actual showing of a violation of rights created by federal law to state a cognizable Section 1983 claim, which warrants an award of attorney's fees under §1983. All that is required is that the plaintiff assert a federal claim that meets the substantiality test. *Maher v. Gagne*, 448 U.S. at 133, n.15, 100 S.Ct. at 2576, n.15. *See also, Golden Gate Transit Corporation v. City of Los Angeles*, 493 U.S. at __, 110 S.Ct. at 448. *Hagens vs. Lavine*, 415 U.S. at 542, 94 S.Ct. at 1381-82.

CONCLUSION

The pattern reflected not only in the instant case, but also in such cases as *Middleton v. Perales, supra, Thomasel v. Perales, supra,* and *Zellweger v. New York State Department of Social Services, supra*, suggests a movement toward repudiation of the federal substantiality test. Indeed, these cases explicitly require that

a violation of §1983 must actually be *shown* in order to entitle the prevailing party to an award of attorney's fees under §1988.

This enlargement of the burden to qualify for attorney's fees is, in itself, a violation of the well established federal standard *in Hagens v. Lavine*, *supra*, and, therefore, violates the Supremacy Clause of the United States Constitution. Moreover, it is a standard that becomes unmeetable whenever state courts refuse to reach, much less decide, the federal claims which have been asserted. Thus, claimants in state court, such as the petitioner herein, will find themselves trapped in a dilemma in which they are required to *prove* federal causes of action which the state courts are *not* obligated even to decide.

For all of the foregoing reasors, this Court should grant a writ of certiorari to review and reverse the decision of the New York State Supreme Court, Appellate Division, Second Department.

Respectfully Submitted,

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APPENDIX A

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twentieth day of December A.D. 1990

Present, HON. SOL WACHTLER, Chief Judge, presiding

2-13 Mo. No. 1064
In the Matter of Shirley Middleton,

Appellant,

v.

Cesar Perales, &c., et al.,

Respondents.

A motion for leave to appeal to the Court of Appeals and for poor person relief in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion for leave to appeal be and the same hereby is denied; and it is

ORDERED, that the said motion for poor person relief be and the same hereby is dismissed as academic.

Donald M. Sheraw
Clerk of the Court

APPENDIX B

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

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___AD2d___ Argued-March 20, 1990

RICHARD A. BROWN, J.P.
GERALDINE T. EIBER
THOMAS R. SULLIVAN
STANLEY HARWOOD, JJ.

3560E

In the Matter of Shirley Middleton, petitioner-respondent,
v. Cesar Perales, etc., appellant,
William J. Grinker, etc., respondent.

DECISION & ORDER

Robert Abrams, Attorney-General, New York, N.Y. (Robert J. Schack and Eugene E. Zegarowicz of counsel), for appellant.

Martin S. Needelman, Brooklyn Legal Services Corp. A, Brooklyn, N.Y. (Terry Herman and Paul Acinapura of counsel), for petitioner-respondent.

Victor A. Kovner, Corporation Counsel, New York, N.Y. (Fred Kolikoff and Julian L. Kalkstein of counsel), for respondent.

In a proceeding pursuant to CPLR article 78, *inter alia*, to compel the respondent Commissioner of the New York City Department of Social Services to comply with the respondent State Commissioner's "Decision After Fair Hearing" dated December 29, 1987, the State Commissioner appeals, as limited by his brief, from so much of an order and judgment (the one paper) of the Supreme Court, Kings County (Vaccaro, J.), dated May 16, 1988, as granted that branch of the petitioner's application which was for an award of attorney's fees assessed against the appellant, and is in favor of the petitioner and against the appellant in the sum of $3,662.50.

ORDERED that the order and judgment is reversed insofar as appealed from, on the law, without costs or disbursements, and that branch of the application which was for an award of attorney's fees assessed against the appellant is denied.

The court erred when it granted the petitioner an award of attorney's fees payable to the appellant pursuant to the Civil Rights Attorney's Fees Award Act of 1976 (42 USC §1988). The underlying proceeding sought, *inter alia*, to compel the respondent Commissioner of the New York City Department of Social Services to comply with a "Decision After Fair Hearing" directing him to restore the petitioner's food stamp benefits. That controversy dealt with the administrative application of State statues and regulations (*see*, Social Services Law §22[9]1 §34[3]; 18 NYCRR former 358.18[8][1], 358.22). There was no showing by the petitioner of a violation of any constitutional right, or the violation by the State of any right created by Federal law (*see, Matter of Williams v D'Elia*, 119 AD2d 678). There was therefore no bona fide civil rights claim pursuant to 42 USC §1983 which would warrant an

award of attorney's fees (*see, Matter of Rozier v Perales*, 149 AD2d 710; *Matter of Williams v D'Elia, supra; Matter of Patterson v Blum*, 86 AD2d 893).

BROWN, J.P., EIBER, SULLIVAN and HARWOOD, JJ., concur.

ENTER:

Martin H. Brownstein
Clerk

April 9, 1990

APPENDIX C

MEMORANDUM

SUPREME COURT KINGS COUNTY (IAS PART 4)
In the Matter of the Application of By: VACCARO, J.
SHIRLEY MIDDLETON,
Petitioner Dated: April 14, 1988

vs.
CESAR PERALES, as Commissioner, etc. Index No. 32434/86
et ano

Petitioner in this Article 78 proceeding, a recipient of public assistance whose food stamp allotment had been improperly terminated by the local agency, moves for the award of an attorney's fee pursuant to 42 USC 1988, the Civil Rights Attorney's Fees Awards Act. She contends she was the prevailing party in a 42 USC 1983 action to secure federally provided rights and is therefore entitled to the award of an attorney's fee.

Petitioner's troubles fall into three distinct episodes. In brief outline, the local agency, without notice of its intention to do so, discontinued her food stamps on January 9, 1986. After a fair hearing the respondent State Commissioner issued his determination on August 18, 1986. He found (1) the local agency had discontinued petitioner's food stamps because of her failure to provide certain information and (2) she had never been asked for any such information, and he concluded she had not failed to comply with the relevant requirements of the food stamp program.

The local agency was therefore directed to restore petitioner's food stamps retroactively, the relevant part of the decision providing:

> The agency's determination to discontinue Food Stamps is not correct and is reversed. The agency must immediately comply with the directives set forth above as required by section 358.22 of the Department's Regulations.

On August 26, 1986 petitioner's attorney sent a copy of the State Commissioner's determination to the local agency and requested its implementation, i.e., issuance of petitioner's food stamps. It appears that on September 5, 1986, petitioner was told the local agency considered the discontinuance of her food stamps to be correct and that it would not comply with the state commissioner's directive. On the same day her attorney wrote to the local agency again as well as to the state agency's compliance section regarding the local agency's refusal to comply and requesting its assistance. For its part, the state agency wrote to the attorney stating the matter would "be reviewed with the local agency to insure that appropriate action is taken." There being nothing forthcoming from the local agency, this proceeding was instituted on November 18, 1986, and petitioner finally received her food stamps in early 1987. This proceeding was then withdrawn.

The next phase began on December 24, 1986, when the local agency notified petitioner it intended to, and did, discontinue her food stamps because of (1) her failure to verify her income and (2) "This action is being taken in compliance with your Fair Hearing Decision." Another fair hearing was held on March 9, 1987 and the court notes that, on the same day, the State Commissioner directed the local agency to restore petitioner's food

stamps immediately. After the second fair hearing the State Commissioner issued his determination on April 15, 1987, which pointed out there had been no change in petitioner's situation since the prior determination and the only basis for the second termination was the local agency's attempted compliance with the prior decision. It concluded the second discontinuance did not constitute a compliance and, accordingly,

> The agency's determination of December 24, 1986 to discontinue appellant's Food Stamp benefits is not correct and is reversed.
>
> The agency is directed to restore all lost Food Stamp benefits retroactive to the date of the agency's action, and the agency was directed to comply immediately.

It appears petitioner's attorney was engaged in a never-ending struggle to have the local agency issue petitioner's food stamps. As noted, this second phase began with the Christmas Eve 1986 termination which preceded the eventual issuance of the food stamps for 1986. The attorney continued to try to get the food stamps issued both before and after the March 9, 1987 directive ordering immediate provision of assistance to petitioner. The local agency continued recalcitrant. Finally, after the second determination (April 15, 1987) and the efforts of the attorney, both directly and through the state agency, the local agency, on or about April 27, 1987, finally issued petitioner's food stamps. So ended the second phase.

The local agency was nothing if not determined, and proceeded to lay the groundwork for another termination. On April

23, 1987, it asked petitioner to come in and provide documentation to support her eligibility for food stamps. The requested information was already in the local agency's possession and it did not in any way affect petitioner's eligibility. On June 10, 1987, petitioner moved to restore this proceeding to the calendar and on July 8, 1987, counsel for the local agency agreed to comply with both fair hearing determinations and a judgment to that effect was made and entered on August 8, 1987.

The record of what took place thereafter is not as complete as it could be but it cannot affect the court's decision on this fee application. It appears the local agency, undaunted as ever, again terminated on June 1, 1987, and the State Commissioner's determination of December 29, 1987, directed the retroactive restoration of petitioner's benefits.

Simply stated, section 1983 allows a recovery to one who, under color of state or local law, is deprived of a right conferred by federal constitution, statute or regulation. As summarized in *Triplett v Azordegan* (570 F2d 819, 822),

> To establish a claim under 42 U.S.C. §1983 two elements must exist. First, the plaintiff must have suffered the deprivation of federally protected rights, privileges or immunities as the result of action taken. (citations omitted). Second, such deprivation must have been caused by a person acting under color of state law (citations omitted).

If one so deprived should prevail in an action or proceeding to enforce such a right, plaintiff is ordinarily entitled to the award of a reasonable attorney's fee pursuant to section 1988.

Petitioner sought in this proceeding to recover her allotment of food stamps, a right granted pursuant to 7 USC Chapter 51 ("Food Stamp Program") and applicable federal regulations. The food stamp program in New York is administered pursuant to Social Services Law 95 and 95a, applicable state regulations and the New York State Food Stamp Manual. Her food stamps were eventually restored to her only as a result of this proceeding. The court therefore concludes she was the prevailing party herein and, as such, entitled to the award of a reasonable attorney's fee pursuant to section 1988. No special circumstances have been shown which might militate against the award of a fee herein (*Rahmey v. Blum*, 95 AD2d 294).

In setting the fee, the court must consider the time reasonably expended multiplied by a reasonable hourly rate (*Hensley v. Eckerhart*, 461 US 424).

Petitioner's attorney has submitted her affirmation setting forth the services rendered and the time spent on each aspect of petitioner's problem. The court has carefully scrutinized the time records submitted and it appears they accurately set forth the time required to handle this matter. It concludes the 29.3 hours recorded were reasonably required for the representation of this petitioner. The court takes note of the fact that 1.5 hours were devoted to the preparation of this application, which compares most favorably with the times reported in some other fee applications it has considered.

In setting the fee, the court must refer to the prevailing hourly market rate in the community. The attorney has set forth her experience in litigation of this type of matter and has requested

a fee of $150 per hour as the prevailing hourly market rate (Blum v. Stenson, 465 US 886). This is comparable to the fees awarded in much recent litigation. The court concludes that, $125 per hour is a reasonable fee under the circumstances. Accordingly, the court concludes a fee of $3,662.50 representing 29.3 hours at $125 per hour would be appropriate in this matter.

The court notes that while the ineptitude and intransigence of the local agency were responsible for the repeated proceedings had herein, it must, on the authority of *Matter of Beaudoin v. Toia [Jorczak]* (45 NY2d 343, 347), grant judgment only as against the State Commissioner. See also *Martinez v. Perales* - AD2d -.

Settle judgment in the amount of $3,662.50 against the respondent State Commissioner and dismissing as to the respondent City Commissioner.

Frank Vaccaro
J.S.C.

APPENDIX D

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

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B/NL

RICHARD A. BROWN, J.P.
GERALDINE T. EIBER
THOMAS R. SULLIVAN
STANLEY HARWOOD, JJ.

Motion No. 90-01393

In the Matter of Shirley Middleton, petitioner-respondent,
v Cesar Perales, etc., appellant,
William J. Grinker, etc., respondent.

DECISION & ORDER

Motion by the respondent for leave to appeal to the Court of Appeals from an order of this court dated April 9, 1990, which reversed an order and judgment of the Supreme Court, Kings County, dated May 16, 1988.

Upon the papers filed in support of the motion and no papers having been filed in opposition thereto, it is

ORDERED that the motion is denied.

BROWN, J.P., EIBER, SULLIVAN and HARWOOD, JJ., concur.

ENTER:

Martin H. Brownstein
Clerk

July 3, 1990

APPENDIX E

DSS-3399(9/81)
STATE OF NEW YORK
DEPARTMENT OF SOCIAL SERVICES

CASE # 3871691
CENTER # 067
FH # 0870088R

In the Matter of the Appeal of

SHIRLEY MIDDLETON

DECISION AFTER FAIR HEARING

from a determination by the NEW YORK CITY Department of Social Services (hereinafter called the agency)

A fair hearing was held at 80 Centre Street, New York, New York, on June 24, 1986, before Daniel J. Duncan, Administrative Law Judge, at which the appellant, the appellant's representative and a representative of the agency appeared. The appeal is from a determination by the agency relating to the discontinuance of an Authorization to Participate in the Food Stamp Program and the adequacy of a grant of Aid to Dependant Children. An opportunity to be heard having been accorded all interested parties and the evidence having been taken and due deliberation having been had, it is hereby found:

(1) The appellant is currently in receipt of a grant of Aid to Dependent Children. She was in receipt of an Authorization to Participate in the Food Stamp Program.

(2) On January 9, 1986, the agency determined to discontinue appellant's Authorization to Participate in the Food Stamp Program on the grounds that the appellant failed to comply with the agency's request to submit:

a. her twenty year old daughter's paystubs and
b. the social security numbers for her three foster children.

(3) On March 19, 1986, the appellant requested this fair hearing to review the agency's determination to remove the shelter allowance from appellant's Public Assistance grant on or about January, 1986.

(4) The appellant's rent was restored to the grant as of the date of its removal and there is no issue remaining with respect to same.

(5) Appellant did not verify her daughter's income and the children's Social Security numbers prior to the agency's determination to discontinue her Authorization to Participate in the Food Stamp Program but had good reason for doing so in that the agency did not request that she provide same.

Section II (A) of the New York State Food Stamp Manual requires parents and children to be considered in the same Food Stamp household, unless one or more are elderly or disabled.

Pursuant to Section III (C)(8)(b) of the New York State Food Stamp Manual, the household has the primary responsibility to provide required documentary evidence. Section IV (C)(3) of the New York State Food Stamp Manual provides that if the local district determines that a household member(s) has refused to provide or apply for a Social Security number, the individual

without the Social Security number shall be ineligible to participate in the Food Stamp Program.

The record, in this case, establishes that the agency determined to discontinue appellant's Authorization to Participate in the Food Stamp Program on the grounds that she failed to comply with the Food Stamp application process by not verifying (1) household income particularly that of her daughter and (2) the Social Security number of three foster children. The credible evidence establishes however that the appellant did not provide said information because she was not requested to provide it. Thus, appellant has, to date, not failed to comply with Section III (C)(8)(b) of the New York State Food Stamp Manual, nor has refused to supply Social Security numbers of household members to the agency. Accordingly, the determination of the agency to discontinue appellant's Food Stamp Authorization was not proper. The agency is directed to restore Food Stamp benefits to the appellant retroactive to the date of discontinuance in accordance with the verified degree of need.

DECISION: There is no issue to be decided with respect to the respect to the removal of rent from the budget. The agency's determination to discontinue Food Stamps is not correct and is reversed. The agency must immediately comply with the directives set forth above as required by Section 358.22 of the Department's Regulations.

DATED: Albany, New York

CESAR A. PERALES,
COMMISSIONER

BY/S/ Henry L. Peter, Jr.

APPENDIX F

MEMORANDUM The City of New York
Human Resources Administration

DATE: 11/6/86

TO: Richard Canberry
Fair Hearing Monitoring Section
250 Church Street - Room 822

RE: Middleton, Shirley
DC-3871691-1
FH-6/24/86
Decision -8/18/86
FH# -0870088R

From: S. Spray-Suprv I
Linden Center
L&A Section

Subject: Non-Compliance

We are not complying with Food Stamp issue due to the following:

1. The notices were indeed sent to the client

a. dated -1/9/86 - discontinuance of FS
b. dated -3/13/86 - discontinuance of FS

As per State regulations requests were beyond statue of limitations and was notified twice of requests for necessary documentation.

2. The children, as per decision it was determined as per verified degree of need (page 2 - paragraph 3) that family is not eligible for Food Stamp benefits.

See attached computations which were presented at hearing.

APPENDIX G

DSS-3399(9/81)
STATE OF NEW YORK
DEPARTMENT OF SOCIAL SERVICES

CASE # 3871691
CENTER # 067
FH # 1001045Z

In the Matter of the Appeal of

SHIRLEY MIDDLETON

DECISION
AFTER
FAIR
HEARING

from a determination by the NEW YORK CITY Department of Social Services (hereinafter called the agency)

JURISDICTION

This appeal is from a determination by the local Social Services Agency relating to the discontinuance of Appellant's Public Assistance, Medical Assistance and Authorization to Participate in the Food Stamp Program on the grounds that the appellant failed to verify all household income.

Pursuant to Section 22 of the New York State Social Services Law (hereinafter Social Services Law), and Part 358 of the Regulations of the New York State Department of Social Services (Title 18 NYCRR, hereinafter Regulations), a fair hearing was held on March 9, 1987, at 80 Centre Street, New York, New York, before Francois Rivera, Administrative Law Judge. The following persons appeared at the hearing:

For the Appellant

Shirley Middleton,
Appellant
Martha Copleman,
Appellant's Representative

For the Local Social Services District (Agency)

Martin Fass, Agency Representative

FACT FINDINGS

An opportunity to be heard having been afforded to all interested parties and evidence having been taken and due deliberation having been had, it is hereby found that:

1. The appellant is in receipt of a grant of Aid to Dependent Children and Medical Assistance and was in receipt of an Authorization to Participate in the Food Stamp Program.

2. On December 24, 1986, the agency determined to discontinue appellant's Food Stamp benefits based on her failure to verify her Supplemental Security Income and Foster Care Income. The discontinuance was an attempt to be in compliance with the Commissioner's directive of August 18, 1986.

3. On January 9, 1986, the agency determined to discontinue appellant's Food Stamp benefits based on her failure to verify her twenty year old daughter's income and on her failure to submit Social Security number of her foster children.

4. On June 24, 1986, a fair hearing was held, number 0970088R, to appeal the agency's determination of January 9, 1986, to discontinue appellant's Food Stamp benefits.

5. The Commissioners of the New York State Department of Social Services in a decision dated August 18, 1986, reversed the

agency's determination to discontinue the appellant's Food Stamp benefits and directed the restoration of all lost Food Stamp benefits retroactive to the date of the agency action.

6. The Commissioner's decision was based in part in the finding that the appellant was not requested to submit proof of household income or Social Security number for her foster children.

7. The agency restored all lost Food Stamp benefits retroactive to the date of its action and then determined to discontinue the Food Stamp benefits again.

8. On January 12, 1987, the appellant requested this hearing to review the agency's determination.

ISSUE

Is the agency's determination of December 24, 1986, to discontinue appellant's Food Stamp benefits based on her failure to verify all household income correct?

APPLICABLE LAW

Section 358.22 of the Regulations provides that:

> When a decision of the Commissioner (whether made after or without a hearing) directs a Social Services official to perform specific actions, such official shall comply promptly with such direction and the department shall ascertain compliance with such direction by inquiry addressed to the applicant or recipient for those whose benefit such direction was given, and by such other means as the

department may deem necessary and appropriate under the circumstances of this case.

Section 387.8 (a) of the Regulations provides in pertinent part that Food Stamp application or recipients must verify all nonexempt household income.

DISCUSSION

The uncontroverted evidence establishes that the agency issued a notice of discontinuance of Food Stamp benefits dated December 24, 1986, in an attempt of the Commissioner of the New York State Department of Social Services in his decision dated August 18, 1986, for fair hearing number 0870088R. The agency conceded that no independent facts subsequent to the fair hearing decision initiated the notice of discontinuance and that the only bases for the notice was compliance with the fair hearing decision number 0870088R. Thus, there is no evidence that the appellant failed to submit proof of her income. The commissioner's directive, however, reversed the agency's determination of January 9, 1986, to discontinue appellant's Food Stamp benefits and directed the restoration of all lost Food Stamp benefits retroactive to the date of its action. The Commissioner did not direct the agency to issue another notice of proposed discontinuance of Food Stamp benefits. The agency's determination of December 24, 1986, is not in compliance with the Commissioner's directive dated August 18, 1986, and has no other independent basis.

DECISION AND ORDER

The agency's determination of December 24, 1986, to discontinue appellant's Food Stamp benefits is not correct and is reversed.

The agency is directed to restore all lost Food Stamp benefits retroactive to the date of the agency's action.

As required by Department Regulations at 18 NYCRR 358.22, the Agency must comply immediately with the directives set forth above.

DATED: Albany, New York
April 15, 1987

CESAR A. PERALES,
COMMISSIONER

BY_____
Commissioner's Designee

APPENDIX H

At an IAS Trial Term Part 4 of the Supreme Court of the State of New York, in and for the County of Kings, located at 360 Adams Street, Brooklyn, New York, on the 6th day of August, 1987.

In the Matter of the Application of

SHIRLEY MIDDLETON,
Petitioner,

For a Judgment Pursuant to Article 78 of the C.P.L.R.,

-against-

CESAR PERALES, as Commissioner of the New York State Department of Social Services and HARVEY ROBINS, as Acting Commissioner of Social Services,

Respondents.

ORDER and JUDGMENT

Index NO. 32434/86

The petitioner having petitioned this Court for an Order and Judgment directing respondent Robins to comply with respondent Perales' hearing decision with respect to petitioner and dated

August 18, 1986, and for other relief, and said petition having come before the undersigned on July 8, 1987.

NOW upon reading the Notice of Motion and Petition of November 14, 1986, the Verified Answer of respondent Perales, verified on February 2, 1987, the Memorandum of Law on Behalf of State Respondent of February 3, 1987, Petitioner's Notice of Motion to Restore to Calendar, dated May 20, 1987, Petitioner's Counsel's Affirmation in Support of Motion, dated June 23, 1987, and respondent Robins' affirmation in Opposition of July 1987;

AND upon hearing MARTHA COPLEMAN, ESQ., in support of the petition and John Jokl, Esq., attorney for respondent Robins' successor, in opposition thereto, IT IS HEREBY

ORDERED that the petition is granted and respondent Robins' successor, WILLIAM GRINKER, and his agency, the New York City Department of Social Services, are mandated to comply immediately with the prior fair hearing decisions of respondent Perales with respect to petitioner, dated August 18, 1986, and April 15, 1987, to provide petitioner with aid-continuing pending her new fair hearing (which is not part of this proceeding), and to provide food stamps to petitioner, within three days of receipt of notice of entry of this Order, in the amount of $81 per month from May 1, 1987, and thenceforth until such time as she is legally determined not to be eligible therefor pursuant to an administrative hearing decision of respondent Perales.

ENTER:

_____

J. S. C.

APPENDIX I

At an I.A.S. Trial Part 4 of the Supreme Court of the State of New York, in and for the County of Kings, located at 360 Adams Street, Brooklyn, New York, on the 16th day of May, 1988.

PRESENT:
HON: FRANK VACCARO
JUSTICE OF THE SUPREME COURT

----------X

In the Matter of the Application of
SHIRLEY MIDDLETON,

Petitioner,

For a Judgment Pursuant to Article 78 of the C.P.L.R.,

-against-

CESAR PERALES, as Commissioner of the New York State Department of Social Services and HARVEY ROBINS, as Acting Commissioner of Social Services,

Respondents.

ORDER and JUDGMENT

----------X

The petitioner having moved this Court for an award of an attorney's fee pursuant to the Civil Rights Attorney's Fee Awards Act, 42 U.S.C. Section 1988, and said motion having come before the undersigned on January 6, 1988,

NOW, upon reading petitioner's Notice of Motion and accompanying Affirmation, dated November 25, 1987, respondent Perales' Answering Affirmation, dated December 10, 1987, and Respondent State Commissioner's Memorandum of Law in Opposition to Petitioner's Request for Attorney's Fees, dated December 10, 1987; respondent Grinker's (undated) Memorandum of Law in Opposition to Petitioner's Request for Attorney's Fees; the Memorandum of Law in Support of Petitioner's Motion for Attorney's Fees, dated January 7, 1988; and petitioner's Supplemental Affirmation, dated January 12, 1988; and upon the papers and proceedings previously had herein;

AND upon hearing Martha Copleman, Esq., in support of the motion, and Eugene Zegarowicz, Esq., counsel for respondent Perales, and John Jokl, Esq., counsel for respondent Grinker, in opposition thereto, IT IS HEREBY

ORDERED that the motion be and hereby is granted as against respondent Perales and denied as against respondent Grinker, and petitioner is awarded and respondent Perales is directed to pay the amount of $3,662.50, as petitioner's attorney's fees, pursuant to 42 U.S.C. Section 1988, within sixty days of said respondent's receipt of notice of entry of this Order and Judgment.

_____

J.S.C.

Anthony N. Durso
Clerk

(2)

No. 91-52

Supreme Court, U.S.
FILED
AUG 2 1991
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

In the Matter of the Application of
SHIRLEY MIDDLETON,

Petitioner,

-against-

CESAR PERALES, as Commissioner of the New York State Department of Social Services, WILLIAM J. GRINKER (as successor to HARVEY ROBINS), Commissioner of the New York City Department of Social Services,

Respondents.

BRIEF OF RESPONDENT WILLIAM J. GRINKER IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

VICTOR A. KOVNER,
Corporation Counsel for the
City of New York,
Attorney for Respondent
William J. Grinker,
100 Church Street,
New York, New York 10007.
(212) 788-1028 or 1067

LEONARD J. KOERNER,*
LARRY A. SONNENSHEIN,
JULIAN L. KALKSTEIN,
of Counsel.

*Attorney of Record

COUNTER-STATEMENT OF QUESTION PRESENTED

Does petitioner's allegation that the New York City Department of Social Services failed to comply with a "Decision After Fair Hearing" by the State Department of Social Services, ordering the City Agency to provide petitioner and only petitioner with food stamp benefits, standing alone without any claim or showing that the City Agency had a policy or practice of failing to timely comply with State Fair Hearing Decisions, raise a substantial federal claim warranting an award of attorneys' fees under 42 U.S.C. §1988?

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

In the Matter of the Application of
SHIRLEY MIDDLETON,

Petitioner,

For a Judgment Pursuant to Article 78 of the C.P.L.R.

-against-

CESAR PERALES, as Commissioner of the New York State Department of Social Services, WILLIAM J. GRINKER (as successor to HARVEY ROBINS), Commissioner of the New York City Department of Social Services,

Respondents.

BRIEF OF RESPONDENT WILLIAM J. GRINKER IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

STATEMENT OF THE CASE

Petitioner, Shirley Middleton (hereafter referred to as "petitioner") was a recipient

of public assistance in the Aid to Dependent Children category. She had two children of her own and three foster children. She was also authorized to participate in the Food Stamp Program. In December, 1985, petitioner received $148 in food stamps.

After December, 1985, petitioner received no further food stamps. She alleged that she received no notice from New York City's Department of Social Services ("Agency") that her food stamps were to be discontinued. On June 24, 1986, at petitioner's request, a "fair hearing" was held to review "a determination by the agency relating to the discontinuance of an Authorization to Participate in the Food Stamp Program and the adequacy of a grant of Aid to Dependent Children." On August 18, 1986, the Commissioner of the State Department of Social Services issued a "Decision After Fair Hearing." App.

10a-12a.[1] The Commissioner found that the Agency's determination to discontinue petitioner's authorization to participate in the Food Stamp Program was based on petitioner's failure to provide paystubs of her 20-year-old daughter and social security numbers for her three foster children. App. 10a. Finding that the Agency had not requested the information, the Commissioner directed it to restore Food Stamp benefits to petitioner retroactive to the date of discontinuance "in accordance with the verified degree of need." App. 11a.

On September 5, 1986, petitioner's attorney wrote to the Compliance Section of the State Department of Social Services stating that the Agency had not implemented

---

[1] Numbers preceded by the letters "App." refer to the pages of the appendix to the Petition For a Writ of Certiorari.

the decision of the Commissioner. The Compliance Unit responded on September 12, 1986 indicating that the matter would be reviewed by the local agency.

On November 8, 1986, the Agency, by way of a memorandum to the Fair Hearing Monitoring Section, stated that it was not providing food stamps because petitioner had been sent two notices apprising her of the discontinuance of food stamps on January 9, 1986 and March 13, 1986. These notices stated that the "necessary documentation" had not been provided by petitioner. App. 13a. In addition, the Agency, as per the Commissioner's decision of August 18, 1986, had verified petitioner's degree of need and found "that [the] family is not eligible for Food Stamp benefits." App. 13a.

On November 14, 1986, petitioner brought a proceeding pursuant to Article 78 of the New York Civil Practice Law and

Rules seeking an order directing the Agency to comply with the Commissioner's Fair Hearing Decision of August 18, 1986.

The Agency did not interpose an answer. According to petitioner, however, it did inform her counsel on January 6, 1987 that "the agency intended to comply with the hearing decision by issuing petitioner's retroactive food stamps to her, and providing her with ongoing food stamp benefits for as long as she was entitled thereto." The same date petitioner informed her attorney that she received over $900 in retroactive food stamps. On February 3, 1986, petitioner withdrew her Article 78 proceeding from the court calendar.

However, on December 24, 1986, the Agency issued petitioner a notice of intent to discontinue food stamps because "you failed to verify your household's foster care and SSI income ..." Thereafter, petitioner

requested another administrative hearing. The hearing was held on March 9, 1987 and on April 15, 1987. Thereafter, the Commissioner issued a Decision After a Fair Hearing and reversed the Agency's notice of December 24 to discontinue benefits because it was not in compliance with the Decision of August 18, 1986. App. 14a-17a. The Agency was directed to provide Food Stamp benefits to petitioner retroactive to the date of the Agency's action. App. 17a.

On May 20, 1987, petitioner moved to restore her Article 78 proceeding to the calendar because the Agency "apparently" discontinued petitioner's food stamps without notice. On June 1, 1987, the Agency issued another notice of intent to discontinue food stamps because of petitioner's failure to submit verification of household income.

On July 7, 1987, the Agency submitted an Affirmation in Opposition to petitioner's

motion to restore the Article 78 proceeding to the calendar. It was the Agency's view that pursuant to 18 NYCRR 387.10(b)(2)(ii), foster care payments must be included in calculating a household's income for purpose of determining eligibility for food stamps. Petitioner receives $993.00 in income and $91.00 in clothing allowance per month for her three foster children, thereby rendering her ineligible for food stamp assistance.

1. **The Supreme Court's Opinion**

By Order and Judgment dated August 6, 1987, the Supreme Court, New York (Vaccaro, J.) ordered the Agency to comply with the fair hearing decisions of August 18, 1986 and April 15, 1987. App. 19a.

Regarding petitioner's application for attorney's fees, the trial court concluded that she was the prevailing party in her claim to an allotment of food stamps pursuant to 7 U.S.C. Chapter 51, and as such, was

entitled to an award of reasonable fees pursuant to 42 U.S.C. §1988.

The trial court awarded attorney's fees in the amount of $3,662.50 as against the State. The trial court found that while the "intransigence of the local agency" was responsible for the repeated proceeding, it felt-constrained to dismiss the application for fees as against the Agency on the authority of Matter of Beaudoin v. Toia (Jorczak), 45 N.Y.2d 343, 347, 408 N.Y.S.2d 417, 419, 380 N.E.2d 246, 247-248 (1978).

2. The Appellate Division's Opinion

The Appellate Division of the New York State Supreme Court for the Second Judicial Department rendered a unanimous decision reversing, the Supreme Court's judgment granting petitioner's application for attorney's fees. App. 2a. Middleton v. Perales, 160 A.D.2d 800, 554 N.Y.S.2d 71 (2d Dept. 1990), appeal denied, 76 N.Y.2d

714, 564 N.Y.S.2d 718, 565 N.E.2d 1269 (1990). The Appellate Division, noting that the underlying proceeding sought to compel the Agency to comply with a "Decision After Fair Hearing" directing the restoration of petitioner's food stamp benefits, ruled that the "controversy dealt with the administrative application of State statutes and regulations (*see*, Social Services Law §22[9]1; §34[3], 18 NYCRR former 358.18[8][1], 358.22)." App. 3a. Id. at 801. The Appellate Division held that "(t)here was no showing by the petitioner of a violation of any constitutional right, or the violation of any right created by federal law (citation omitted)." App. 3a. Id. at 801.

3. Applications For Leave To Appeal

On May 25, 1990, petitioner moved in the Appellate Division, Second Department for leave to appeal to the Court of Appeals

of the State of New York. The application was denied on July 3, 1990. App. 9a.

Thereafter, petitioner sought leave in the Court of Appeals. This motion was denied on December 20, 1990. App. 1a.

REASONS FOR DENYING THE WRIT

Petitioner originally was authorized to receive food stamps. She alleges that after December 1985, her food stamps were discontinued without notice. She requested and was given a hearing to review the determination to discontinue her food stamps. The State Commissioner issued a decision directing the Agency to restore petitioner's stamp benefits retroactive to the date of their discontinuance. When the Agency failed to comply with the directive, petitioner brought her Article 78 proceeding for an order directing the Agency to comply with the decision of respondent Perales. Thus, if

the Agency had complied with the order of the Commissioner, petitioner would have had no basis for her Article 78 proceeding. Petitioner was not aggrieved by a denial of benefits, as the State's decision was in her favor. Rather, petitioner brought an Article 78 proceeding in the nature of a mandamus action to have the court order the Agency to comply with the administrative decision of the State to provide petitioner with food stamp benefits. Petitioner does not allege a conflict with any federal mandate regarding food stamp allotments and state regulations. Petitioner also does not allege an official policy of the State or the Agency or a failure to comply with Federal law or State law or regulations. Rather, petitioner brings her lawsuit predicated on isolated acts of a City agency. Such a claim does not provide the predicate for an attorney's

fee application as against the City Agency or a case worthy of review by this Court.

PETITIONER'S ALLEGATION THAT THE CITY AGENCY FAILED TO COMPLY WITH A STATE FAIR HEARING DECISION DIRECTING THE AGENCY TO PROVIDE PETITIONER WITH FOOD STAMP BENEFITS, WITHOUT A CLAIM THAT THE CITY AGENCY HAD A PRACTICE OR POLICY OF NOT TIMELY COMPLYING WITH STATE FAIR HEARING DECISIONS DOES NOT RAISE A SUBSTANTIAL FEDERAL CLAIM WARRANTING AN AWARD OF ATTORNEYS' FEES.

(1)

In Monell v. Department of Social Services of the City of New York, 436 U.S. 658, 690 (1978), this Court explained that

> the touchstone of the §1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights....

* * *

> [A] local government may ... be sued under §1983 ... when [it is the] execution of a government's policy or custom ... [that] inflicts the injury. [That is when] the government as an entity is responsible under §1983.

Id at 690, 694. See also, Simpson v. New York City Transit Authority, 112 A.D. 89, 91, 491 N.Y.S.2d 645, 647 (1st Dept. 1985), aff'd, 66 N.Y.2d 1010, 499 N.Y.S.2d 396, 489 N.E.2d 1298 (1985). Moreover, to maintain an action under 42 USC §1983, an individual is required to plead and prove that the official policy or custom is what caused the deprivation of that individual's rights. Batista v. Rodriguez, 702 F.2d 393, 397 (2d. Cir 1983). "'[T]he mere invocation of the 'pattern' or 'plan' [will] not suffice without this causal link.'" Id. at 397. "At the very least there must be an affirmative link between the policy and the particular ... violation alleged." Oklahoma City v.

Tuttle, 471 U.S. 808, 823 (1985). To establish a causal link, it must be shown that an official policy "by its terms" violates an individual's rights; or, in the case of a "more nebulous" policy (i.e., a custom or pattern and practice), it must be shown that it was "a course of action consciously chosen from among various alternatives" that caused the deprivation. Id. at 822-823. While Monell involved a violation of the Equal Protection Clause, there is nothing in the language of Monell or subsequent cases to indicate that its broad holding, requiring proof of official policy in cases brought for "monetary, declaratory, or injunctive relief", should be limited to constitutional questions, and is not applicable to statutory claims.

This Court in Monell also explained that a suit commenced against an individual in his official capacity is "only another way of pleading an action against [the] entity of

which an officer is an agent." Id. at 690, n.55. This Court elaborated on this point in Kentucky v. Graham, 473 U.S. 159 (1985), where it stated that

> in an official-capacity action ... for a governmental entity [to be] liable under §1983 .. the entity itself [must be] a "'moving force'" behind the deprivation [citing cases]...; thus in an official-capacity suit the entity's "policy or custom" must have played a part in the violation of federal law.

Id. at 166; Oklahoma City, supra, 471 U.S. at 820.

In the case at bar, petitioner commenced her Article 78 proceeding against Cesar Perales as Commissioner of the New York State Department of Social Services, and William Grinker as Commissioner of the New York City Department of Social Services. This is clearly an official-capacity suit, as each official has been sued in his capacity as commissioner. In order to

maintain a §1983 claim, petitioner must do more than merely allege federal statutory and constitutional violations; she must make a showing that the Agency had a policy of failing to comply with State Fair Hearing Decisions. Petitioner has not and cannot establish that this was the Agency's policy on the basis of the isolated incidents alleged in her petition.[2]

---

[2] In Moore v. Perales, 85 Civ. 1638 (CPS), memorandum opinion and order, (E.D.N.Y. June 27, 1988), on a motion for partial summary judgement, the District Court considered the New York City Department of Social Service's compliance with Fair Hearing Decisions in cases involving Aid to Families with Dependent Children ("AFDC") and food stamps. The Court found that from February 1986 to February 1987, the Agency complied in 95% of AFDC cases within 30 days as required by law, and in 90% of food stamp cases within 10 days as required by law. The Court also noted that the Agency is taking steps to further improve its performance. Slip op. at 9. Compare, Haskins v. Stanton, 794 F.2d 1273, 1276 (7th Cir. 1986).

(2)

Undaunted, petitioner, under the veil of a supremacy clause argument, asserts that her claim was based on the violation of a federal statute by respondents. This view misconstrues the nature of the action at bar.

In Maine v. Thiboutot, 448 U.S. 1 (1980), this Court held that the plain language of §1983 embraces claims based on violations of federal statute alone. Id. at 4. This Court also held that attorney's fees may be awarded to the prevailing party under 42 USC §1988 ("§1988") in such §1983 actions based on statutory violations. Id. at 9. There, the respondents, who were recipients of AFDC benefits, challenged the State's method of computing their benefits. Id. at 3. Attorney's fees were granted because the State's regulations were in conflict with the federal Social Security Act, and thus, amounted to an official policy that operated

to deprive families of rights secured by federal statute. Id. at 3; Oklahoma City, supra, 471 U.S. at 822. Since this case involves only a failure of compliance, it is governed by State regulation, and there has been no violation by the Agency of federal law or regulation.[3]

In Oberlander v. Perales, 740 F.2d 116 (2d Cir. 1984), the Court of Appeals for the Second Circuit considered a §1983 action based on an alleged federal statutory violation. The plaintiff's claim was based on a violation of a state regulation governing Medicaid reimbursement promulgated in

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[3] In this context, it is worth noting that petitioner's prayer for relief only requests judgment (1) directing the Agency respondent to comply with the State respondent's hearing decision; (2) directing the Agency respondent to restore petitioner's food stamp immediately; and 3) directing the State respondent to "supervise and monitor the agency to assure its compliance with the said hearing decision."

conformity with the federal Medicaid statute and regulations. The plaintiff argued that this was "ipso facto a violation of federal Medicaid laws and regulations." Id. at 119. The Circuit Court "reject[ed] this tortuous argument", and found that

> there is no authority anywhere supporting the proposition that a state ... regulation becomes a federal law merely by virtue of its inclusion in a state plan required by federal law ....

Id. at 119. In dismissing the statutory claim the Circuit Court held that to be the basis of a §1983 action there must be "a specific conflict between a state plan or practice on the one hand and a federal mandate on the other." Id. at 119, citing cases; Mont v. Heintz, 849 F.2d 704, 709 (2d Cir. 1988); Friedman v. Perales, 616 F.Supp 1363, 1369 (S.D.N.Y. 1985). There has been no allegation in this case that the state regulations in any way conflict with federal

mandate, and it was shown that the Agency has a specific policy of adhering to those regulations. See, Gelin v. Perales, 149 A.D.2d 593, 595, 540 N.Y.S. 2d 275, 277 (2d Dept. 1989).

(3)

Lastly, we note that in certain cases fees may be granted on State grounds if petitioner seeks relief on both State grounds and Federal grounds. United Mine Workers of America v. Gibbs, 383 U.S. 715, 725 (1966). The "two-pronged Gibbs test" is the same as the test for pendent jurisdiction. It permits an award of attorney's fees if (1) the federal claim has substance sufficient to confer subject matter jurisdiction, and (2) the federal and non-federal claims derive from a common nucleus of operative fact. The determination of the federal claim's substantiality is based on whether it is "wholly insubstantial",

"obviously frivolous", or "obviously without merit." See, Matter of Johnson v. Blum, supra, 58 N.Y.2d at 458 n. 2, 461 N.Y.S. 2d 782, 783, 448 N.E.2d 449, 450 (1983), citing, Hagans v. Lavine, 415 U.S. 528, 537-538 (1974).

Here, although it appears that petitioner's state and federal claims derive from a common nucleus of operative facts, petitioner's federal claims fail to meet the substantiality requirement. In cases involving cooperatively funded public welfare programs, "failure to comply with State regulations, without more, does not implicate an interest secured by the laws of the United States." Matter of Misuraca v. Perales, 120 A.D.2d 592, 593-594, 501 N.Y.S.2d 907, 909 (2d Dept 1986). Instead, a claim is stated under Section 1983 only when a conflict between the state plan (or a state practice) and federal law is alleged.

Oberlander v Perales, supra, 740 F.2d at 119.

The petition in this case alleges no such conflict between state law or practice and federal law. Similarly, in those cases relied on by petitioner for her ominous assertion that the Appellate Division, Second Department of the State of New York "is refusing to take cognizance of substantial federal claims," the moving parties did not allege that state laws or practices did not comply or conflict with federal mandates; rather, each case was based on an allegation of an isolated incident concerning the Agency's failure to abide by a state regulation. See, Thomasel v. Perales, 161 A.D.2d 646, 647, 555 N.Y.S.2d 423 (2d Dept. 1990); Cruz v. Perales, 158 A.D.2d 597, 551 N.Y.S.2d 568, 569 (2d Dept. 1990); Rashid v. Perales, 156 A.D.2d 692, 549 N.Y.S.2d 166, 167 (2d Dept. 1989); Rozier

v. Perales, 149 A.D.2d 710, 540 N.Y.S.2d 504, 505 (2d Dept. 1987), appeal denied, 74 N.Y.2d 993, 550 N.Y.S.2d 274, 549 N.E.2d 476 (1989). Stringing these matters together as petitioner has, neither raises a claim of an unconstitutional Agency practice or pattern, nor a substantial constitutional question worthy of review by this Court.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

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July 30, 1991.

Supreme Court, U.S.
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No. 91-52

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

In the Matter of the Application of SHIRLEY MIDDLETON,

Petitioner,

—against—

CESAR PERALES, as Commissioner of the New York State Department of Social Services, and WILLIAM J. GRINKER (as successor to HARVEY ROBINS), as Commissioner of the New York City Department of Social Services,

Respondents.

RESPONDENT PERALES' BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTION PRESENTED

Does petitioner's allegation that the New York State Department of Social Services failed to ensure that the New York City Department of Social Services complied in a timely manner with a Decision After Fair Hearing to provide petitioner with food stamp benefits, standing alone without a claim or showing at the administrative proceeding or in the trial court that the State agency had a practice or policy of failing to supervise the City agency's compliance, raise a substantial federal claim warranting an award of attorneys' fees under 42 U.S.C. § 1988?

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RESPONDENT PERALES' BRIEF IN OPPOSITION

REASONS FOR DENYING THE WRIT

State respondent Cesar Perales, Commissioner of the New York State Department of Social Services, agrees with respondent William J. Grinker, Commissioner of the New York City Department of Social Services, that the petition for certiorari should be denied, substantially for the reasons set forth in respondent Grinker's brief in opposition.[1]

The petition should be denied for the additional reason that the same issues raised by petitioner herein as to the State agency's single state agency responsibilities and its super-

1 Commissioner Grinker has been succeeded in office by Barbara J. Sabol. Since this is a suit against the respondents in their official capacity, Ms. Sabol should be substituted for Mr. Grinker as the proper respondent.

vision of the City agency are the subject of an appeal to be argued to the New York Court of Appeals on October 17, 1991, in *Matter of Thomasel v. Perales*, 161 A.D.2d 646 (2d Dep't 1990), *leave to appeal granted*, 77 N.Y.2d 808 (1991).

The first question raised for review herein is whether the appellate courts in New York have "repudiated the Supremacy Clause of the United States Constitution by repudiating the federal standards for awarding attorneys fees under 42 U.S.C. § 1988?" Petition, p. i. Ms. Middleton's second question is "Whether the Petitioner alleged a substantial federal claim warranting an award of attorney fees under 42 U.S.C. § 1988?" *Id.* at i. Her claim against the State respondent is that the State agency allegedly failed "to ensure that its directives were implemented within the specified time period, as the federal regulations explicitly require it to do." *Id.* at 21.

In *Thomasel*, the appellant parallels petitioner's questions by presenting, *inter alia*, the following questions: "Does respondent Perales violate petitioner's federal rights if he fails to compel the city agency to continue her full ADC benefits during the pendency of her administrative appeal?", "If petitioner's federal rights are violated by the pre-hearing reduction of her AFDC benefits, may she resort to 42 U.S.C. 1983 to enforce those rights?", and "If so, is petitioner entitled to an attorney's fee award pursuant to 42 U.S.C. 1988 even if the court decided her appeal on state law ground?" Brief for Petitioner-Appellant at 3-5.[2]

In addition to arguing in *Thomasel*, as respondent Grinker has shown here, that the federal issues raised are not in fact substantial, the State respondent will argue in *Thomasel* that his agency does properly supervise local agencies and that it takes effective action as the single state agency to ensure compliance with its directives. Thus, both sides in *Thomasel* are presenting the New York Court of Appeals with essen-

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2 As petitioner does here, the *Thomasel* appellant argues extensively that the State Supreme Court's Appellate Division for the Second Department has a practice and policy of denying attorney fees to petitioners who have raised substantial federal claims. *Id.* at 12-18.

tially the same arguments that would be briefed to this Court in the present case.

The decision in *Thomasel* will clarify the State agency's duty to supervise and address the derivative issue of petitioner's entitlement to fees. Review of the Court of Appeals' decision can then be sought in this Court. This case is inappropriate, however, to address those questions, since the Court of Appeals did not pass on its merits and the Appellate Division did not have the benefit of that Court's guidance.

CONCLUSION

The Petition For A Writ Of Certiorari Should Be Denied.

Dated: New York, New York
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No. 91-52

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

SHIRLEY MIDDLETON,

Petitioner,

-against-

CESAR PERALES, as Commissioner of the New York State Department of Social Services, and WILLIAM GRINKER (as successor to HARVEY ROBBINS), as Commissioner of the New York City Department of Social Services,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND DEPARTMENT

---

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ARGUMENT

I. THE CITY AGENCY'S BRIEF IGNORES THE CONSTITUTIONAL ISSUE CREATED BY THE FAILURE OF THE APPELLATE DIVISION TO REACH OR CONSIDER PETITIONER'S FEDERAL CLAIM, THEREBY VIOLATING THE SUPREMACY CLAUSE.

1. The failure or refusal to consider the federal claim cannot be the basis for denying attorneys' fees under 42 U.S.C. §1988.

The city agency is opposing the instant petition on the ground that petitioner did not raise a substantial federal claim warranting an award of attorney's fees because she did not show that the city agency had a policy or practice of not complying with fair hearing decisions in a timely manner. In making such an argument, the city is completely evading the primary basis upon which petitioner is seeking review of this case and is asking this Court to decide an issue never even reached by the Appellate Division in New York.

The entire thrust of the instant petition is that the Appellate Division in this and in many other cases is failing even to acknowledge the existence of federal claims advanced by recipients of government benefits who are seeking attorney's fees after prevailing on the merits. As discussed in the petition, the Appellate Division in this case held that petitioner was not entitled to attorney's fees because the proceeding merely involved the application of state statutes and regulations. In reaching its conclusion that petitioner failed to show a violation of her rights under federal law, the

court made absolutely no reference to the federal claims alleged under the Food Stamp regulations and the Due Process clause of the United States Constitution. In doing so, the Appellate Division totally disregarded the requirements set forth by this Court in *Maher v. Gagne*, 448 U.S. 122, 100 S.Ct. 2570, 65 L.E.2d 653(1980), for determining whether a prevailing party is entitled to attorney's fees where relief was sought on both federal and state grounds.

In *Maher*, this Court noted that if a plaintiff prevails on a claim for which fees may not be awarded, the lower court must decide whether the federal claims alleged warrant an award of attorney's fees, 448 U.S. at 133, n.15, 100 S.Ct. at 2576, n.15. Fees may be awarded if one of the federal claims meet the substantiality test of *Hagens v. Lavine,* 415 U.S 528, 94 S.Ct. 1342, 39 L.E.2d 577 (1974) (see Petition, pp. 20-21) and arose from the same nucleus of facts as the state claim on which plaintiff prevailed.

What this Court is being asked to review in the instant petition is the Appellate Division's repeated failure to make the required determination as to whether any of the federal claims alleged are substantial. By simply concluding that a proceeding involves state law only, without even considering the merits of the federal claims asserted, the Appellate Division is ignoring the dictates of *Maher v. Gagne, supra*, in violation of the Supremacy Clause. As this Court has made clear, when a state court action seeks to enforce federal law, the Supremacy Clause requires the state court "...to proceed in such manner that all the substantial rights of the parties under controlling federal law [are] protected." *Felder v. Casey*, 487 U.S. 131, 151, 108 S.Ct. 2302, 2313, 101 L.E.2d 123 (1988), quoting from *Garrett v. Moore-McCormick Co.*,

317 U.S. 239, 245, 63 S.Ct. 246, 251, 87 L.E.2d 239 (1942). Far from protecting the crucial federal rights asserted by recipients of government benefits, the Appellate Division has been discriminating against these rights, pretending that they do not exist.

The city agency's argument that the petition should be denied because the petitioner did not assert a substantial federal claim is, therefore, a disingenuous attempt to divert this Court's attention from the serious constitutional issue raised. Moreover, the City is asking this Court to make the very decision that the Appellate Division was required to render in the first instance, but never did. As the city undoubtedly knows, this is not the proper function of this Court. The question of whether petitioner has to demonstrate a policy or practice of non-compliance with hearing decisions in order to establish a substantial federal claim must first be addressed by the Appellate Division.

2. Petitioner alleged substantial federal claims warranting an award of attorney's fees.

If this Court were to consider the merits of the federal claims alleged, it should find that they meet the substantiality test of *Hagens v. Lavine, supra.* As discussed in the petition, the failure of the city agency to comply with her hearing decision until more than four and one-half months after the decision was issued and ten months after the hearing was requested, violated federal Food Stamp regulations which directly command local agencies to comply with decisions within federally specified time periods. 7 C.F.R. Sec. 273.15(c)(1). Additionally, these regulations provide that the

state agency has the ultimate responsibility for ensuring timely compliance. 7 C.F.R. Sec. 273.15(s).

In view of the above-mentioned federal regulations, it is totally erroneous for the city agency to contend that compliance with hearing decisions is governed solely by state law (see brief, p.18). The mere fact that parallel state regulations also were violated in no way renders the subject of fair hearing compliance a matter of state law only. Rather, these provisions merely give further effect to rights that are created by federal law and are enforceable under 42 U.S.C. Sec. 1983.

It was also shown in the petition that the respondents lengthy delay in complying with petitioner's hearing decision may have constituted a violation of her due process rights under the U.S. Constitution. In *Fusari v. Steinberg*, 419 U.S. 379, 389, 95 S.Ct. 533, 540 (1975), this Court maintained that the length of wrongful deprivation of government benefits is an important factor in determining the due process that is required. It is certainly conceivable that a court may have found that the city agency's four and one-half month delay in complying with petitioner's hearing decision violated her due process rights. This is particularly so given the city agency's blatant refusal to comply at all, prior to the commencement of this lawsuit.

In attempting to demonstrate that petitioner's federal claims are not substantial, the city agency cites the New York case of *Misuraca v. Perales*, 120 A.D.2d 592, 501 N.Y.S.2d 907 (2d Dept. 1986). In that case, the court held that petitioner was not entitiled to attorney's fees because her only federal claim was insubstantial and the "failure to comply with

state regulations, without more, does not implicate an interest secured by the laws of the United States." 120 A.D.2d at 593-94, 501 N.Y.S.2d at 909.

The petitioner in *Misuraca* contended that her due process rights were violated at her fair hearing because the city agency did not produce the person who made the determination to reduce her benefits. The court maintained, however, that since there were no factual issues in dispute and the decision turned solely on the correct interpretation of a state regulation, there was no need for petitioner to cross-examine witnesses. Thus, the court held that she was not deprived of due process, and consequently, she did not present a substantial federal claim for attorney's fees purposes. 120 A.D.2d at 594, 501 N.Y.S.2d at 909-10.

In contrast to *Misuraca*, the petitioner in the instant case asserted a substantial violation of her right to timely compliance with her decision under federal food stamp regulations. Moreover, if necessary, the lower court may have found that the lengthy delay constituted a violation of her due process rights. Accordingly, *Misuraca* is inapposite to the instant proceeding as it illustrates nothing more than a case where the petitioner's only meritorious claims were under state law.

The city agency's reliance on *Oberlander v. Perales*, 740 F.2d 116 (2d Cir. 1984), is also misplaced. The plaintiff in that case alleged that the reduction in patient reimbursement rates violated its rights under federal statutes and the Constitution. The court dismissed the statutory claim, emphasizing that it was based entirely on alleged violations of the State's medicaid regulations. In reaching its conclusion,

the court rejected plaintiff's contention that since the State's medicaid plan must conform to the federal Medicaid statute, a violation of any part of the State plan is also a violation of the federal law. *Id.* at 119.

Oberlander, supra, is easily distinguishable from the instant case since as the Second Circuit noted, the plaintiff did not allege that any federal laws were violated. In sharp contrast, the petitioner herein claimed that the defendants violated her rights under very specific federal regulations governing compliance with fair hearing decisions concerning food stamps.

3. Petitioner could have established the existence of a policy or practice of untimely compliance with fair hearing decisions if given the opportunity to do so.

Although the issue of whether the respondents had a policy or practice of non-compliance with hearing decisions was one for the Appellate Division to decide in the first instance, petitioner could have demonstrated the existence of such a policy or practice if she had been required to do so. She was never given the opportunity, however, since the lower courts never addressed the issue.

In support of its contention that petitioner could not show such a policy or practice, the city agency cites *Moore v. Perales*, 85 Civ. 1638 (CPS) memorandum opinion and order (E.D.N.Y. June 27, 1988), in which the court found that the city timely complied with 95% of hearing decisions involving public assistance benefits and 90% of decisions concerning food stamps. These statistics, however, can easily be

considered from the reverse perspective, revealing that there was untimely compliance in a large number of cases. One can reasonably argue that wrongfully impairing the ability of one in ten persons to eat, or one in twenty family's ability to pay rent or clothe their children constitutes a practice of noncompliance in violation of the recipient's federal rights.

Additionally, petitioner may have been able to establish through discovery that the State agency has a policy or practice of taking no meaningful action to ensure compliance with fair hearing decisions. The record in this case already contains evidence showing that the State did virtually nothing to compel compliance with petitioner's hearing decision aside from sending the city agency a tracking sheet about one week after the decison was rendered. It appears that the state agency took no further action even after it received a memorandum from the city agency stating that the decision would not be implemented.

The Appellate Division, however, did not give petitioner the opportunity to demonstrate that either the State or City agency has a practice of failing to ensure timely compliance with hearing decisions. Therefore, if this Court believes that it is necessary for petitioner to establish the existence of such a practice in order to be awarded attorney's fees, it is respectfully requested that this case be remanded to the Appellate Division for this purpose.

II. THE STATE AGENCY'S BRIEF ALSO IGNORES THE CONSTITUTIONAL ISSUE CREATED BY THE APPELLATE DIVISION'S FAILURE TO APPLY ESTABLISHED FEDERAL DECISIONAL LAW FOR EVALUATING ATTORNEYS' FEES CLAIMS UNDER 42 U.S.C. §1988.

The abbreviated brief submitted by Respondent Perales adopts the arguments which have been set forth in the brief of the City agency, and have been refuted hereinabove.

It also advances the unique argument that another case (*Thomasel v. Perales*, 161 A.D.2d 646 (2d Dept. 1990), leave to appeal granted, 77 N.Y.2d 808(1991) will soon be heard by the New York Court of Appeals which case deals with the State Agency's duties to compel the City agency to comply with the orders of the former.

The State's brief herein, like that of the City Agency, completely ignores the heart of petitioner's claim; that the Appellate Division cannot deny attorney's fees by the simple expedient of refusing to reach and consider the petitioner's federal claim at all. To do so violates the controlling decisions of this Court. *Maher v. Gagne, supra; Hagens v Lavine, supra; Felder v. Casey, supra.*

CONCLUSION

For the reasons stated herein, and in the Petition for Writ of Certiorari, this Court should grant a writ of certiorari to review and reverse the decision of the New York State Supreme Court, Appellate Division, Second Department.

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